

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-D-1918 (MJW)

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKWOOD HOMES LLC, a Limited Liability Company; and
NIEBUR GOLF, INC., an Oregon Corporation,

Defendants.

CONSENT DECREE

WHEREAS, Plaintiff United States of America, on behalf of the Secretary of the Army, acting through the Chief of the United States Army Corps of Engineers, filed the Complaint herein against Defendant Oakwood Homes LLC and Defendant Niebur Golf, Inc. (“Defendants^{1/}”) alleging that the Defendants violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a) and Section 404(s) of the CWA, 33 U.S.C. § 1344(s).

WHEREAS, the Complaint alleges that the Defendants violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at a site or sites located in the City and County of Denver, Colorado, (the “Site”) and more fully described in the Complaint, without authorization by the United States Department

^{1/} “Defendants” refers to Defendant Oakwood Homes LLC and/or Defendant Niebur Golf, Inc., jointly and severally.

of the Army, Corps of Engineers (“Corps”), and in contravention of the conditions and limitations of a permit issued by the Corps;

WHEREAS, the Complaint alleges that the Defendants violated Section 404(s) of the CWA, 33 U.S.C. § 1344(s), by failing to comply with the conditions and limitations set forth in a permit issued by the Secretary of the Army, acting through the Chief of Engineers of the Corps and more fully described in the Complaint (“Permit”);

WHEREAS, after the violations of the Permit were reported to the Corps by Defendants, the Corps and the Defendants agreed that Defendants would redesign and reconstruct the Green Valley Ranch Golf Course to cure and to otherwise mitigate the violations of the Permit;

WHEREAS, during the latter part of 2001 and early 2002, Defendants redesigned and reconstructed the Green Valley Ranch Golf Course to cure and to otherwise mitigate the violations of the Permit;

WHEREAS, Defendant Oakwood Homes LLC has contributed 24.49 acres of real property in and around the Green Valley Ranch Golf Course for the restoration of new wetlands;

WHEREAS, Defendant Oakwood Homes LLC has applied to the Corps for an amendment to the Permit (“Amended Permit”);

WHEREAS, the Amended Permit shall encompass such restoration and mitigation projects as required by the Corps;

WHEREAS, Defendant Niebur Golf, Inc., no longer owns any interest in or has any involvement with the Green Valley Ranch Golf Course;

WHEREAS, the Complaint seeks:

- A. To enjoin the discharge of pollutants into waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a);
- B. To require the Defendants to fully comply with the terms and conditions of the Permit;
- C. To require the Defendants, at their own expense and at the direction of the Corps, to restore and/or mitigate the damages caused by their unlawful activities; and
- D. To require the Defendants to pay civil penalties as provided in Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and Section 404(s)(4) of the CWA, 33 U.S.C. §1344(s)(4);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Complaint regarding the Site;

WHEREAS, the United States and the Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against the Defendants in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against the Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto

by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 309(b) and 404(s)(3) of the CWA, 33 U.S.C. §§ 1319(b) and 1344(s)(3).

2. Venue is proper in the District of Colorado pursuant to Sections 309(b) and 404(s)(3) of the CWA, 33 U.S.C. §§ 1319(b) and 1344(s)(3); as well as 28 U.S.C. § 1391(b) and (c), because the Defendants conduct business in the District of Colorado, the subject property is located in the District of Colorado, and the causes of action alleged herein arose in the District of Colorado.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Defendant Oakwood Homes LLC, its officers, directors, agents, employees and servants, and its successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with Defendant Oakwood Homes LLC, whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against Defendant Oakwood Homes LLC, Defendant Oakwood Homes LLC shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or

corporation acting in concert or participation with Defendant Oakwood Homes LLC, to take any actions necessary to comply with the provisions hereof.

5. Defendant Oakwood Homes LLC acknowledges that the title to the Site is vested in Town Center Metropolitan District. If during the term of this Consent Decree, ownership and/or any other interest in the Green Valley Ranch Golf Course, as more particularly described in Attachment 1 hereto and incorporated herein by reference, is transferred to another person, corporation and/or entity, such transfer shall not alter or relieve Defendant Oakwood Homes LLC of its obligation to comply with all of the terms and conditions of this Consent Decree.

6. If during the term of this Consent Decree, ownership and/or any other interest in the Green Valley Ranch Golf Course is transferred to another person, corporation and/or entity, at least fifteen (15) days prior to such transfer the party making such transfer shall provide a true and correct copy of this Consent Decree to its successor(s) in interest and shall simultaneously provide written notice to the Corps and the United States Department of Justice at the addresses specified in Section V below that such notice has been given.

7. If during the term of this Consent Decree, ownership and/or any other interest in the Green Valley Ranch Golf Course is transferred to another person, corporation and/or entity, a condition of such transfer shall be that:

- A. The obligations of this Consent Decree shall apply to and be binding upon Defendant Oakwood Homes LLC;
- B. Defendant Oakwood Homes LLC shall reserve all rights necessary to comply with the terms of this Consent Decree; and

- C. The obligations of this Consent Decree shall apply to and be binding upon any and all successors in interest.

III. SCOPE OF CONSENT DECREE

8. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against the Defendants under Section 301 of the CWA, 33 U.S.C. § 1311, concerning the Site.

9. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in Section 101 of the CWA, 33 U.S.C. § 1251. All plans, studies, construction, remedial maintenance, monitoring programs, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendant Oakwood Homes LLC to achieve and maintain full compliance with, and to further the purposes of, the CWA.

10. The Defendant Niebur Golf, Inc.'s obligations under this Consent Decree shall cease at the time Defendant Niebur Golf, Inc., pays its civil penalty as provided for in this Consent Decree.

11. Except as in accordance with this Consent Decree, Defendant Oakwood Homes LLC and its agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

12. This Consent Decree is not and shall not be interpreted to be a permit or a modification of the Permit or the Amended Permit or any other existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify,

suspend, revoke or deny the Permit or the Amended Permit or any other individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the United States Environmental Protection Agency's ("EPA") ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

13. This Consent Decree in no way affects or relieves Defendant Oakwood Homes LLC of its responsibility to comply with the Permit or the Amended Permit, and any amended permit or any other applicable federal, state, or local law, regulation or permit.

14. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

15. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

16. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

17. The provisions this Consent Decree are in addition to, and in no way limit or otherwise affect, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from Defendant Oakwood Homes LLC as authorized by law.

IV. SPECIFIC PROVISIONS

A. CIVIL PENALTIES

18. Defendant Oakwood Homes LLC shall pay a civil penalty to the United States in the amount of Seventy-Eight Thousand Dollars (\$78,000) within 30 days of entry of this Consent Decree.

19. Defendant Niebur Golf, Inc., shall pay a civil penalty to the United States in the amount of Twenty Thousand Five Hundred Dollars (\$20,500) within 30 days of entry of this Consent Decree.

20. Defendant Oakwood Homes LLC and Defendant Niebur Golf, Inc., shall each make the above-referenced payments by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the United States Department of Justice account in accordance with current electronic funds transfer procedures, referencing Corps Permit number 199980245, Corps of Engineers, Omaha District, DOJ case number 90-5-1-1-16706 and USAO case number 2002V00349. Each payment shall be made in accordance with instructions provided to Defendant Oakwood Homes LLC and to Defendant Niebur Golf, Inc., by the Financial Litigation Unit of the United States Attorney's Office for the District of Colorado. Any payments received by the United States Department of Justice after 4:00 p.m. (Eastern Standard Time) will be credited on the next business day.

21. Upon payment of the civil penalty by Defendant Oakwood Homes LLC required by this Consent Decree, Defendant Oakwood Homes LLC shall provide written notice, at the addresses specified in Section V of this Consent Decree, that such payment was made in accordance with Paragraph 20.

22. Upon payment of the civil penalty by Defendant Niebur Golf, Inc., required by this Consent Decree, Defendant Niebur Golf, Inc., shall provide written notice, at the addresses specified in Section V of this Consent Decree, that such payment was made in accordance with Paragraph 20.

23. If Defendant Oakwood Homes LLC fails to make payment of the civil penalty required by this Consent Decree in accordance with the terms and conditions of this Consent Decree, Defendant Oakwood Homes LLC shall pay a One-Hundred-Dollar per day penalty for each day Defendant Oakwood Homes LLC fails to pay the civil penalty in accordance with the terms and conditions of this Consent Decree.

24. If Defendant Niebur Golf, Inc., fails to make payment of the civil penalty required by this Consent Decree in accordance with the terms and conditions of this Consent Decree, Defendant Niebur Golf, Inc. shall pay a One-Hundred-Dollar per day penalty for each day Defendant Niebur Golf, Inc. fails to pay the civil penalty in accordance with the terms and conditions of this Consent Decree.

25. Defendant Oakwood Homes LLC shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the United States Department of Justice account in accordance with current electronic funds transfer procedures, referencing Corps Permit number 199980245, Corps of Engineers, Omaha District, DOJ case number 90-5-1-1-16706, and USAO number 2002V0349. Payment shall be made in accordance with instructions provided to Defendant Oakwood Homes LLC by the Financial Litigation Unit of the United States Attorney's Office for the District of Colorado. Any payments received by the United States Department of Justice after 4:00 p.m. (Eastern Standard Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendant Oakwood Homes LLC shall provide written notice, at the addresses specified in Section V of this Consent Decree.

26. Defendant Niebur Golf, Inc. shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the United States Department of Justice account in accordance with current electronic funds transfer procedures, referencing Corps Permit number 199980245, Corps of Engineers, Omaha District, DOJ case number 90-5-1-1-16706, and USAO number 2002V0349. Payment shall be made in accordance with instructions provided to Defendant Niebur Golf, Inc. by the Financial Litigation Unit of the United States Attorney's Office for the District of Colorado. Any payments received by the United States Department of Justice after 4:00 p.m. (Eastern Standard Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendant Niebur Golf, Inc. shall provide written notice, at the addresses specified in Section V of this Consent Decree.

27. Civil penalty payments pursuant to this Consent Decree (including stipulated penalties under paragraphs 23 and 24) herein, are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

B. DOCUMENT RECORDATION

28. Defendant Oakwood Homes LLC shall, within fifteen (15) days of entry of this Consent Decree, record a notice of this Consent Decree with the Recorder of Deeds, in the City and County of Denver, Colorado. The notice shall be in the form as set forth in Attachment 2 hereto.

29. Defendant Oakwood Homes LLC, within fifteen (15) days after the Corps issues the Amended Permit, if any, shall record a certified copy of the Amended Permit

together with the legal description appended thereto as Attachment 1 with the Recorder of Deeds, in the City and County of Denver, Colorado.

C. AMENDED PERMIT

30. Defendant Oakwood Homes LLC has applied to the Corps for the Amended Permit.

31. The Amended Permit shall encompass such restoration and mitigation projects as required by the Corps.

32. In addition, Defendant Oakwood Homes LLC shall, within fifteen (15) days after receiving the Amended Permit, record a certified copy of the Amended Permit with Town Center Metropolitan District.

33. Defendant Oakwood Homes LLC shall comply with all of the terms and conditions of the Amended Permit.

34. Upon completion of the terms and conditions required by the Amended Permit and in acting in continual compliance with the Amended Permit, Defendant Oakwood Homes LLC shall not mow, cut, clear, cultivate, dredge, excavate, fill, dewater, drain or otherwise disturb in any manner whatsoever any location identified as wetlands in the Amended Permit except as approved by the Corps.

35. If the Amended Permit is not issued by the Corps within nine (9) months after the entry of this Consent Decree, Plaintiff United States and Defendant Oakwood Homes LLC shall file a joint motion to reopen this Consent Decree for the purpose of amending this Consent Decree to provide for restoration and remediation of the waters of the United States impacted by the violations of the CWA as alleged in the Complaint.

36. If the Amended Permit is vacated, remanded, and/or voided by a court, Plaintiff United States and Defendant Oakwood Homes LLC shall file a joint motion to reopen this Consent Decree for the purpose of amending this Consent Decree to provide for restoration and remediation of the waters of the United States impacted by the violations of the CWA as alleged in the Complaint.

V. ADDRESSES

37. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO THE CORPS:

U.S. Army Corps of Engineers
Omaha District
Denver Regulatory Office
9307 South Wadsworth Boulevard
Littleton, CO 80128

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE:

Chief
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, DC 20026-3986

C. TO THE UNITED STATES ATTORNEY FOR THE DISTRICT OF COLORADO:

Chief, Civil Division
United States Attorney's Office
1225 Seventeenth Street
Suite 700
Denver, CO 80202

D. TO DEFENDANT OAKWOOD HOMES LLC:

Oakwood Homes LLC
4908 Tower Road
Denver, CO 80248

E. TO DEFENDANT NIEBUR GOLF, INC.

Niebur Golf, Inc.
Suite 100
830 Tenderfoot Hill Road
Colorado Springs, CO 80906

VI. COSTS OF SUIT

38. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action.

39. Should Defendant Oakwood Homes LLC subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendant Oakwood Homes LLC shall be liable for any costs or attorneys' fees incurred by the United States in any action against Defendant Oakwood Homes LLC for noncompliance with or enforcement of this Consent Decree.

VII. PUBLIC COMMENT

40. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the this Consent Decree is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this

Consent Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of this Consent Decree.

VIII. CONTINUING JURISDICTION OF THE COURT

41. This Court shall retain jurisdiction over this action in order to enforce or modify this Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of this Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate this Consent Decree.

IX. MODIFICATION

42. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by the United States, the Defendants and approved by the Court.

X. TERMINATION

43. The parties shall file a motion to terminate this Consent Decree after all of the following events have occurred:

- A. Defendant Oakwood Homes LLC has paid the civil penalty as required by this Consent Decree;
- B. Defendant Oakwood Homes LLC has paid stipulated penalties, if any;
- C. Defendant Niebur Golf, Inc. has paid the civil penalty as required by this Consent Decree;
- D. Defendant Niebur Golf, Inc. has paid stipulated penalties, if any;

E. Defendant Oakwood Homes LLC has:

- (1) Been issued the Amended Permit by the Corps; or
- (2) Agreed to reopen this matter and to be bound by an Amended Consent Decree as provided for in paragraph 35 herein. The Amended Consent Decree shall terminate pursuant to the terms and conditions of the Amended Consent Decree; and

F. Defendant Oakwood Homes LLC has fully complied with the terms and conditions of this Consent Decree or the Amended Consent Decree, if any.

44. Upon the Court granting the motion to terminate this Consent Decree, the Notice of Consent Decree shall be released by Mr. Timothy T. Carey, Operations Manager & Chief, Denver Regulatory Office, U.S. Army Corps of Engineers, or his designee.

IT IS SO ORDERED.

United States District Judge

Dated and entered this _____ day of _____ 2004.

FOR PLAINTIFF UNITED STATES OF AMERICA

JOHN W. SUTHERS
United States Attorney

Dated: _____

STEPHEN D. TAYLOR
Assistant U.S. Attorney
1225 Seventeenth Street
Suite 700
Denver, CO 80202

Telephone: (303) 454-0100

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS

Dated: _____

KURT F. UBBELOHDE
Colonel, Corps of Engineers
District Engineer
106 South 15th Street
Omaha, NE 68102-1618

Telephone: (402) 221-4059

FOR DEFENDANT OAKWOOD HOMES LLC

BERENBAUM, WEINSHIENK & EASON, P.C.

Dated: _____

EDWIN G. PERLMUTTER, ESQ.
370 Seventeen Street
Suite 4800
Denver, CO 80202

Telephone: (303) 825-0800

OAKWOOD HOMES LLC

Dated: _____

PATRICK H. HAMILL
President
4908 Tower Road
Denver, CO 80248

Telephone: (303) 843-6303

FOR DEFENDANT NIEBUR GOLF, INC.,

ROTHGERBER JOHNSON & LYONS, LLP

Dated: _____

BRUCE N. WARREN, ESQ.
90 S. Cascade Avenue
Suite 1100
Colorado Springs, CO 80903

Telephone: (719) 386-3000

NIEBUR GOLF, INC.

Dated: _____

JOSEPH NIEBUR
President
Suite 100
830 Tenderfoot Hill Road
(719) 527-0313